



## **DEPARTMENT OF COMMERCE**

### **National Oceanic and Atmospheric Administration**

#### **50 CFR Part 648**

**[Docket No. 211104-0225]**

**RIN 0648-BK96**

### **Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Removal of Prohibitions for Gillnet Gear in Nantucket Lightship and Closed Area I**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** This action reopens gillnet fishing in the Nantucket Lightship and Closed Area I Closure Areas previously ordered suspended by a Court decision. Gillnet fishing will be allowed in the Nantucket Lightship and Closed Area I Groundfish Closure Areas, as approved in the New England Fishery Management Council's Omnibus Essential Fish Habitat Amendment 2. This action is necessary to end the suspension of measures from a previously approved and implemented Council action and remove temporary prohibitions that were in place to comply with a Federal court order.

**DATES:** Effective on *[insert date of publication in the Federal Register]*.

**FOR FURTHER INFORMATION CONTACT:** Moira Kelly, Senior Fishery Program Specialist, Greater Atlantic Regional Fisheries Office, 978-281-9218

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**SUPPLEMENTARY INFORMATION:** On January 3, 2018, NMFS partially approved the New England Fishery Management Council's Omnibus Essential Fish Habitat Amendment 2. The Omnibus Amendment updated essential fish habitat

designations for all Council-managed species and implemented changes to the spatial management of Council-managed fisheries throughout the Gulf of Maine, Georges Bank, and Southern New England. On April 9, 2018, a final rule implemented the approved measures (83 FR 15240). The final rule opened, modified, and maintained various previously closed areas, as well as established new closures to implement approved measures of the Amendment. The Nantucket Lightship and Closed Area I Groundfish Closure Areas were opened to fishing by gears capable of catching groundfish, including gillnets and bottom-trawls, throughout the areas in this final rule. (Note, scallop fishing was prohibited for a brief time, pending a follow-on scallop action that incorporated the newly opened areas into the Scallop Fishery Management Plan's rotational management program. See: 83 FR 17300; April 19, 2018.) Directed groundfish fishing had been prohibited in these general areas consistently since the 1980s and early 1990s.

The Conservation Law Foundation filed suit against NMFS arguing that the rulemaking process that allowed the opening of the Nantucket Lightship and Closed Area I Groundfish Closure Areas to gears capable of catching groundfish, including gillnet gear, was not done in compliance with the Endangered Species Act consultation requirements as it pertains to North Atlantic right whales.

On October 28, 2019, First District Court Judge James E. Boasberg (see *Conservation Law Found. v. Ross*, No. CV 18-1087 (JEB), 2019 WL 5549814 (D.D.C. Oct. 28, 2019)) agreed with the Conservation Law Foundation and enjoined NMFS from allowing gillnet fishing in those previously closed areas, until such time that NMFS fully complied with the requirements of the Endangered Species Act and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). We implemented that suspension through a final rule on December 17, 2019 (84 FR 68798).

### **Reopening Closure Areas to Gillnet Fishing**

Recently, NMFS completed the Endangered Species Act Section 7 Consultation on 10 fisheries and the New England Fishery Management Council's Omnibus Essential Fish Habitat Amendment. The consultation concluded that the implementation of the approved portions of the Amendment, including removing the prohibition on gillnet fishing in the Nantucket Lightship and Closed Area I Groundfish Closure Areas, would not result in large shifts of fishing effort across or within the region. As a result, these shifts are not expected to increase the risk to protected species in the region. The completion of this consultation satisfied the requirements of the court order.

Therefore, this action re-opens the Nantucket Lightship and Closed Area I Closure Area to gillnet fishing, as approved in the Omnibus Habitat Amendment.

#### **On-Going Issues Related to Gillnet Fishing and North Atlantic Right Whales**

The Atlantic Large Whale Take Reduction Team is considering broader impacts of gillnet fishing on North Atlantic right whales. These considerations may include area-based closures (seasonal or year-round) or other measures that may restrict gillnet fishing in the areas of the Nantucket Lightship and Groundfish Closure Areas in the future. Interested parties should continue to follow the Take Reduction Team process and provide comments, concerns, and suggestions as described. More information is available on our website (<https://www.fisheries.noaa.gov/new-england-mid-atlantic/marine-mammal-protection/atlantic-large-whale-take-reduction-plan>).

#### **Classification**

Pursuant to section 304(a) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that the regulations as implemented in this final rule are necessary to discharge the Secretary's responsibilities under the Magnuson-Stevens Act and to comply with the Order issued from the First District Court on October 28, 2019.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

The NMFS Assistant Administrator finds good cause that prior notice and an opportunity for public comment is unnecessary or contrary to public interest pursuant to 5 U.S.C. 553(b)(B). Notice and opportunity for public comment prior to reopening the Nantucket Lightship and Closed Area 1 Groundfish Closure Areas to gillnet fishing is contrary to public interest because the Omnibus Habitat Amendment and its suspended measures fully comply with the Endangered Species Act and Magnuson-Stevens Act, and the prohibitions against fishing with gillnets are no longer necessary to comply with the Court's order enjoining fishing with gillnets in the Nantucket Lightship and Closed Area I Groundfish Closure Areas. Because the Amendment is now in full compliance with the Endangered Species Act and Magnuson-Stevens Act, the Secretary has no basis on which to keep the areas closed or modify the gillnet provisions that the Secretary approved in the Amendment. Further delaying reopening the areas for public comment would be inconsistent with the Secretary's responsibility to carry out fishery management amendments the Secretary has approved and are in full compliance with all applicable laws.

Additional opportunity for public comment on the open areas is unnecessary because notice and opportunity for comment on the Omnibus Habitat Amendment measures and its implementing regulations were provided already. The development of the Omnibus Habitat Amendment was a public process led by the New England Fishery Management Council, during which there were over 200 public meetings. The public had an opportunity to comment on the Amendment's measures and regulations involved in this action when they were implemented through publication in the **Federal Register** of the proposed and final rules for the Omnibus Habitat Amendment. An additional opportunity for comments on the suspended measures would be unnecessarily duplicative. Therefore, it is unnecessary and contrary to the public interest to delay this action for prior notice and the opportunity for public comment.

For the same reasons as above and additional reasons stated below, pursuant to 5 U.S.C. 553(d)(3), the NMFS Assistant Administrator finds good cause for these provisions to be effective immediately upon publication of this final rule. A delay in implementation is unnecessary because affected members of the public do not need time to prepare and the rule relieves a restriction implemented by the Court. The suspended measures were implemented on April 9, 2018. From that day until December 17, 2019, approximately 11 gillnet vessels took 39 trips into these areas. These vessel owners and operators along with others are familiar with the suspended measures. Access to these areas once these measures are restored and the prohibitions removed in this action is expected to provide an economic benefit to gillnet vessels fishing in these areas. Delaying the effective date for reopening these areas will unnecessarily delay and reduce this economic benefit to these vessels that could be gained during this fishing year.

#### **List of Subjects in 50 CFR Part 648**

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: November 4, 2021.

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Carrie Robinson,

Acting Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

For the reasons stated in the preamble, 50 CFR part 648 is amended as follows:

#### **PART 648--FISHERIES OF THE NORTHEASTERN UNITED STATES**

1. The authority citation for part 648 continues to read as follows:

**Authority:** 16 U.S.C. 1801 *et seq.*

**§ 648.81 [Amended]**

2. In § 648.81, remove paragraph (a)(6).

[FR Doc. 2021-24510 Filed: 11/9/2021 8:45 am; Publication Date: 11/10/2021]